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February 14, 2008

By e-filing

Anne K. Quinlan, Esq  
Acting Secretary  
Surface Transportation Board  
395 E Street, S W, Suite 1149  
Washington, DC 20024

Re Docket No AB-1014, *Denver & Rio Grande Railway Historical Foundation --  
Adverse Abandonment -- in Mineral County, CO*

Dear Ms Quinlan

Pursuant to 49 C F R Part 1114, Subpart A, Protestant DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION hereby respectfully requests the Board, in deciding the application for adverse abandonment in the above proceeding, to take official notice of its own decision in its Docket No AB-290 (Sub-No. 286), *Norfolk Southern Railway Company - Adverse Abandonment - St Joseph County, IN*, decision served February 14, 2008. A copy of that decision is attached to this request for official notice. This request for official notice is justified because that decision was served after the deadline for the filing of the Foundation's Protest in the above proceeding, which was January 31, 2008.

Very truly yours,

*Tom McFarland*

Thomas F. McFarland  
*Attorney for Denver & Rio Grande  
Railway Historical Foundation*

TMcf kl wp8 01/237efSTB4

cc Ronald Johnson, Esq )  
John Heffner, Esq ) *by e-mail*  
John L. Richardson, Esq )  
Mr. Donald H. Shank )

**SURFACE TRANSPORTATION BOARD DECISION DOCUMENT**  
**Decision Information**

Docket Number. **AB\_290\_286**

Case Title: **NORFOLK SOUTHERN RAILWAY COMPANY--ADVERSE  
ABANDONMENT--ST. JOSEPH COUNTY, IN**

Decision Type. **Decision**

Deciding Body: **Entire Board**

**Decision Summary**

Decision Notes: **DECISION DENIED AN APPLICATION FILED BY THE CITY OF  
SOUTH BEND, IN, THE BROTHERS OF HOLY CROSS, INC., AND THE  
SISTERS OF THE HOLY CROSS, INC. TO REQUIRE OR PERMIT THE  
ADVERSE ABANDONMENT OF TWO NORFOLK SOUTHERN RAILWAY  
COMPANY RAIL LINES IN ST. JOSEPH COUNTY, IN.**

**Full Text of Decision**

  
37729  
EB

**SERVICE DATE – FEBRUARY 14, 2008**

**SURFACE TRANSPORTATION BOARD**

**DECISION**

**STB Docket No AB-290 (Sub-No 286)**

**NORFOLK SOUTHERN RAILWAY COMPANY—ADVERSE ABANDONMENT—  
ST JOSEPH COUNTY, IN**

**Decided February 13, 2008**

On November 21, 2006, the City of South Bend, IN (the City), and two religious orders (the Orders) – the Brothers of Holy Cross, Inc (the Brothers), and the Sisters of the Holy Cross, Inc (the Sisters) (collectively, Applicants) – filed an application under 49 U S C 10903 asking the Board to find that the public convenience and necessity (P&CN) require or permit the adverse abandonment of two Norfolk Southern Railway Company (NSR) rail lines (Lines) in St Joseph County, IN<sup>[1]</sup> The Chicago, Lake Shore and South Bend Railway Company (CLS&SB) filed a protest,<sup>[2]</sup> and NSR filed a comment<sup>[3]</sup> Applicants filed a reply We are denying the application In a companion decision issued today, we are lifting the Board's stay of a notice of exemption filed by CLS&SB that will permit CLS&SB to acquire and operate the Lines, and we are denying Applicants' petition to reject and/or revoke that notice of exemption<sup>[4]</sup>

## BACKGROUND

The Lines measure approximately 3.7 miles in length. The longer line (the UV Line) extends 2.8 miles between milepost UV 0.0 and milepost UV 2.8, and has a 100-foot wide right-of-way. The shorter line (the ZO Line) extends 0.9 miles between milepost ZO 9.6 and milepost ZO 10.5, and has a [5]

60-foot wide right-of-way. The Lines connect at milepost UV 2.8, which is located on the Brothers' property. The ZO Line extends northerly from milepost UV 2.8 onto the Sisters' property, where it connects at milepost ZO 9.6 to an industrial spur. The spur extends easterly onto the campus of the University of Notre Dame (the University), where there is an inactive rail station, and terminates at the University's coal-fired power plant.

[6]  
The Lines were acquired by NSR's parent, Norfolk Southern Corporation, in June 1999. NSR currently delivers coal to a transload facility in the South Bend area for final delivery by truck to the University's on-campus power plant. There has been no rail service on the Lines since the mid-1990's, when the rail-to-truck transloading began. According to CLS&SB, the round-trip truck haul to and from the transload facility is 12 miles.

On June 14, 2006, before the City and the Orders filed their adverse abandonment application, CLS&SB filed a verified notice pursuant to 49 CFR 1150.31 et seq. invoking a class exemption to [7]

acquire from NSR and operate 3.2 miles of the Lines. Applicants objected. They asked the Board to revoke the class exemption as applied to CLS&SB's proposal and suggested that the exemption be dismissed. In August 2006, after the University had announced its intention to continue to use truck service to receive coal at its power plant, NSR informed the Board that it would not agree to sell the Lines to CLS&SB. CLS&SB then asked to withdraw its notice of exemption without prejudice. That request was granted in a decision served on September 11, 2006.

CLS&SB filed a second notice of exemption to acquire and operate the 3.2 miles of the Lines on November 21, 2006. See CLS&SB—Acquisition. Applicants again objected, alleging that CLS&SB's notice contained false and misleading information. In a decision served on November 22, 2006, the Board stayed the effectiveness of the exemption pending clarification. The notice was served and published at 71 FR 76426 on December 20, 2006, but the stay remained in effect. In the companion decision issued today, we are denying Applicants' petition to reject and/or revoke the notice of exemption, and we are lifting that stay.

In the application, the City and the Orders argue that the Lines have no value as instruments of interstate commerce because they have not been used in more than 10 years. They claim that sections of the Lines have been paved over and removed at numerous locations and that the switch connection to NSR's main line at milepost UV 0.0 has been removed. Applicants also contend that NSR does not own a fee interest in the rights-of-way underlying the ZO Line and the industrial spur. They claim that these rights-of-way were acquired by easements, that the easements have expired for nonuse, and that the Brothers and the Sisters are the sole owners of the reversionary interests.

Applicants further assert that the Lines do not fit within the City's development plans and that the rights-of-way are needed for public purposes. The City plans to acquire or condemn portions of the rights-of-way for the installation of "a massive storm sewer development effort that will meet the Federal Government's mandate for separated storm and sanitary sewer systems" and the construction of a recreational trail. The Orders claim that the Lines are interfering with the future development of their

campuses. Applicants also argue that a resumption of rail operations through South Bend would create a nuisance

### APPLICABLE STANDARDS

Under 49 U S C 10903(d), the standard governing any application for authority to abandon a line of railroad is whether the present or future PC&N require or permit the proposed abandonment. In applying this standard in an adverse abandonment context, we must consider whether there is a present or future public need for rail service over the line and whether that need is outweighed by other

[8]  
interests

We have exclusive and plenary jurisdiction over abandonments to protect the public from an unnecessary discontinuance, cessation, interruption, or obstruction of available rail service [9]  
Accordingly, we preserve and promote continued rail service where a carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic [10]  
On the other hand, we do not allow our jurisdiction to be used to shield a line from the legitimate processes of state law where no overriding Federal interest exists [11]  
If we conclude that the PC&N does not require or permit continued operation over the track, our decision removes that shield, enabling the applicant to pursue other legal remedies to force the carrier off a line [12]

### DISCUSSION AND CONCLUSIONS

**A Present or Future Need For Service** Applicants claim that there has been no rail service on the Lines or requests for rail service for at least 10 years and that there is "no demonstrable need for future rail service" Application at 2. They also claim that NSR has made no effort to solicit traffic or reinstitute service since acquiring the Lines in 1999, and that a survey conducted by the City's Economic Development Specialist indicated no shipper interest in rail service over the Lines. More specifically, Applicants assert that the University has publicly stated that "it has no intention of receiving coal by rail" (Application, Attachment F, *Laurent V S* at 3) and that the Brothers and the Sisters have no current or future need for rail service. Under the circumstances, Applicants contend that it would be "economically infeasible to attempt to reinstate service" Application at 9.

The record, however, shows that there is a potential for renewed rail operations. There is traffic suitable for rail that could move over the Lines, there is a railroad willing to carry that traffic, and there is at least one shipper capable of receiving that traffic. As CLS&SB points out, the University currently receives 80,000 tons of coal annually, has upgraded its coal plant in the face of increasing electrical

[13]  
demands, and is expected to need 100,000 tons of coal annually in the near future. The fact that the University received coal by rail for several decades before switching to delivery by truck from a transloading facility indicates that its plant is capable of handling rail deliveries. And according to CLS&SB, Buckeye Industrial Mining Company – the provider of the University's coal pursuant to a long-term coal supply contract – supports the plan to resume coal deliveries by rail and offered CLS&SB "the same price per ton for coal delivery that they were paying the trucking company at the time of the agreement." CLS&SB Protest, Exhibit A, *Harris V S* at 2-3. CLS&SB estimates that 2 weekly trains of 15 cars each would replace the approximately 3,500 truck loads a year (14 truck loads a

day 5 days a week) that currently move coal to the University. Thus, there is no doubt that traffic that could use the Lines is available.

There is also a carrier willing to carry the traffic over the Lines' track and that track can be readily made adequate to handle the service. Applicants claim that the Lines have been degraded to the point that rail service is no longer feasible, but CLS&SB's efforts to acquire the Lines attest to the Lines' potential for rail operations. NSR, the Lines' current owner, notes that the switch connection to its main line was removed sometime after June 1, 2004, but states that it could be reinstalled if there is reason to do so. NSR further states that it would not be economically prohibitive to rehabilitate the Lines to permit rail service to resume for coal deliveries to the University's campus. Indeed, NSR points out that it retained the Lines for this reason. To be sure, the Lines would require some work before they could become operational. But CLS&SB states that, to resume rail service, it is prepared to spend \$476,000 to rehabilitate the track and rights-of-way. CLS&SB also states that it has already acquired and stockpiled crossing gates and signals and will reinstall them at its own expense.

Moreover, the record indicates that there is a shipper to which the coal might be delivered. It is true that the University publicly withdrew its support for CLS&SB's original proposal, which is why NSR withdrew from the sale initially. But the record also shows that the University might be interested [14] in again receiving coal shipments by rail directly to its power plant.

Applicants' own statements and actions indicate that they see a real possibility that rail service could resume if the Lines remained in the rail system. The City's expressed concerns about the proximity of the UV Line to residential areas, parks, schools, and recreational centers, about the city streets that would be crossed, and about the noise that rail operations over the Lines would produce all reflect an implicit concession that the potential for resumed rail service is real.

**B Other Interests** As noted, in assessing the merits of an adverse abandonment request, we look not only at the present or future interest in rail service, but also at the other interests that are implicated. In doing so, we are mindful of Congress' intent, as expressed in many statutory provisions, [15]

that lines be kept within the rail system where possible. Thus, as NSR points out, an applicant seeking Board authorization for an adverse (involuntary) abandonment must meet a heavy burden. That is why the Board has stated in the past that authority for an adverse abandonment would not be granted, even in the absence of current traffic on a line, if there is a reasonable potential for future railroad use [16]

Here, Applicants assert that the Lines' rights-of-way are needed for the installation of a storm water sewer and a recreational trail. But those possible plans alone do not warrant removing these Lines from the national rail transportation network. Those projects can proceed without the abandonment of [17]

the Lines. The City acknowledges that it could build the sewer under the city streets, and CLS&SB claims that a representative of the City stated "that the preferred alternative was not to install the sewer along the Lines, but rather to run the sewer down Diamond Street." CLS&SB Protest, Exhibit A, Harris V S at 5. Moreover, CLS&SB has offered to make the rights-of-way available for both the sewer and trail use, should it acquire and operate the Lines. Even if trail use were a basis for forcibly taking an unabandoned line out of the rail system – which it is not – Applicants have not shown that the 100-foot wide right-of-way for most of the length of the Lines is not sufficient for both active rail service and a trail under the operations CLS&SB hopes to undertake here.

The City's expressed concern about the noise, danger, and interference with vehicular traffic that would result from renewed rail service does not afford a basis for granting the application. Any operations over the Lines would be subject to safety rules imposed by the Federal Railroad Administration. And it is unlikely that the operations that would take place, if the University were to resume its use of rail service to haul coal (only amounting to 2 trains a week), would have a significant impact on the City.

The City also expresses concern that the Lines, as things now stand, constitute a health hazard. Asserting that the rights-of-way are punctuated by pools of standing and stagnant water and strewn with salvaged track materials, unkempt vegetation, and trash, the City argues that the Lines are breeding grounds for mosquitoes, wildlife, and vermin. In complaining about the negative impacts of an unused and neglected rail line, however, the City failed to explain why it cannot employ its police powers to rectify these problems. Moreover, the resumption of rail service should mitigate these concerns.

[18]

Additionally, Applicants state that the Lines traverse the property owned by the Orders, and that keeping the Lines in place impedes the Orders from achieving their missions. The record, however, does not indicate that the Orders would not be able to continue using their properties to carry out their missions or to develop their properties, if rail service on the Lines were restored. The Orders have conducted their educational and other beneficial activities for many years, notwithstanding the presence of, and in years past, operations over, the Lines. While the Orders might prefer to annex the rights-of-way, the same could be true for any property owner carrying on activities adjacent to rail property. The purpose of our statutory power is to prevent interstate commerce from being unreasonably interfered

[19]

with, and to shield useful rail properties from annexation for the benefit of local interests. To justify withdrawing our protective jurisdiction over a rail line, we require a greater showing than that a local activity, however meritorious, would be somehow enhanced if the line were to be abandoned.

In sum, Applicants have not met their burden of establishing that the PC&N requires or permits the adverse abandonment of the Lines at this time. There remains on the Lines a potential receiver with a significant annual demand for coal. Although that shipper presently receives its coal via rail transload to truck, under appropriate circumstances the potential remains for a resumption of direct rail service to satisfy that demand.

It may be that CLS&SB's efforts to resume service will ultimately prove fruitless, but we will not short-circuit them at the outset. Therefore, we cannot find, based on this record, that the Lines have little or no present or future utility as instruments of interstate commerce. The record before us demonstrates a need to protect the Lines as part of the interstate rail system. The preferences of the City, even with the support of the Orders, do not provide a basis, on this record, for granting this adverse abandonment. See Cross Harbor. Given the potential for continued rail service and CLS&SB's desire to provide it, we conclude that the public interest is best served by denying this adverse abandonment application. We note, however, that our finding is without prejudice to Applicants' seeking to reopen or file a new abandonment application, should the line transfer, rehabilitation, and restoration of operations not occur within a reasonable period of time. Yakima Interurban Lines Association—Adverse Abandonment—in Yakima County, WA, STB Docket No. AB-600, slip op. at 6 (STB served Nov. 19, 2004).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered

- 1 CLS&SB's petition to supplement its previously filed environmental comments is denied
- 2 This adverse abandonment application is denied
- 3 This decision is effective on its service date

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey

Anne K. Quinlan  
Acting Secretary

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[1]

Notice of the filing was served and published at 71 FR 71609 on December 11, 2006. Applicants had previously filed a petition for exemption from certain statutory provisions and waiver of certain Board regulations, which was granted in part in a decision served on October 26, 2006.

[2]

CLS&SB had also filed petitions to reject Applicants' notice of intent to file this adverse abandonment application and the application itself. These petitions were denied in a decision served on January 23, 2007.

[3]

On December 21, 2007, CLS&SB filed a petition to supplement the environmental comments it filed on January 22, 2007. Applicants filed a reply in opposition on December 26, 2007. Because we are denying the application, the environmental issues are moot and we will deny the motion to supplement.

[4]

The Chicago Lake Shore and South Bend Railway Company—Acquisition and Operation Exemption—Norfolk Southern Railway Company, STB Finance Docket No. 34960 (CLS&SB—Acquisition)

[5]

Applicants' original notice of intent included the portion of the ZO Line between milepost ZO 9 48 and milepost ZO 9 9. Applicants have since narrowed their application.

[6]

See CSX Corp. et al.—Control—Conrail Inc. et al., 3 S T B 197 (1998).

[7]

The exemption notice covered the portions of the Line between milepost UV 0 0 and milepost UV 2 8 and between milepost ZO 9 48 and milepost ZO 9 9, including any ownership interest in the spur. See The Chicago Lake Shore and South Bend Railway Company—Acquisition and Operation Exemption—Norfolk Southern Railway Company, STB Finance Docket No. 34893 (STB served and published at 71 FR 38447 on July 6, 2006).

[8]

See New York Cross Harbor R.R. v. STB, 374 F.3d 1177, 1180 (D.C. Cir. 2004) (Cross

Harbor), City of Cherokee v ICC, 727 F 2d 748, 751 (8th Cir 1984)

[9]

See Modern Handcraft, Inc —Abandonment, 363 I C C 969, 972 (1981) (Modern Handcraft)

[10]

See Chelsea Property Owners—Abandonment—Portion of the Consolidated Rail Corp 's West 30th Street Secondary Track in New York, NY, 8 I C C 2d 773, 779 (1992) (Chelsea), aff'd sub nom Consolidated Rail Corp v ICC, 29 F 3d 706 (D C Cir 1994) (Conrail)

[11]

See CSX Corporation and CSX Transportation, Inc —Adverse Abandonment Application—Canadian National Railway Company and Grand Trunk Western Railroad, Inc, STB Docket No AB-31 (Sub-No 38) (STB served Feb 1, 2002)

[12]

See Conrail, 29 F 3d at 709, Modern Handcraft, 363 I C C at 972

[13]

Coal can generally be moved more efficiently by rail than by truck, and rail transportation is generally considered less damaging to the environment than truck transportation. And coal is not all that could move, CLS&SB also states that the University could expand its use of rail service to include inbound movements of limestone and outbound movements of fly ash.

[14]

In an article in the South Bend Tribune, the Executive Vice President of the University was reported as having stated, in relating his discussions with the Mayor of South Bend, that

I assured the mayor at that stage that if the city and the county were strongly opposed to the railroad proposal, the university would not go forward. If the rail line reopened, the city supported it, safety issues were addressed and neighborhood residents didn't mind it, Notre Dame would consider using rail service again for coal deliveries, depending on the cost.

Margaret Fosmae, "Notre Dame drops coal by rail option," South Bend Tribune, June 22, 2006, Application, Attachment I

[15]

The Interstate Commerce Act, as amended, contains procedures (e.g., 49 U S C 10904 and 10907) under which to-be-abandoned lines may be transferred to other carriers for continued rail service. And the Trails Act provides a process ("rail banking") under which rail lines that would otherwise be abandoned can be kept in the system for future rail use, even if active rail service is not imminent, by permitting their use in the interim as recreational trails. See 16 U S C 1247(d)

[16]

See, e.g., Seminole Gulf Railway, L P —Adverse Abandonment—in Lee County, FL, STB Docket No AB-400 (Sub-No 4) (STB served Nov 18, 2004)

[17]

The City asserts that the sewer could be built more cheaply if the portion of the Lines within its jurisdiction were physically removed, but this does not appear to take into account the cost and compensation the City would have to pay to condemn and acquire that portion of the Lines.

[18]

NSR disputes the Brothers' and the Sisters' claims that they hold a reversionary interest in rail rights-of-way that would vest upon abandonment, but resolution of that issue is not necessary to our

<http://www.stb.dot.gov/decisions/readingroom.nsf/51d7c65c6f78e79385256541007f0580/> 2/14/2008



decision here

[19]

See City of Lincoln v STB, 414 F 3d 858, 862 (8th Cir 2005) (city cannot use its power of eminent domain to take a strip of railroad right-of-way for use as a trail if the property might be needed for activities related to rail transportation in the future)

**Decision Attachments**

37729.pdf

88 KB

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